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APPELLANT PRO SE:

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Deputy Attorney General  
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**IN THE  
COURT OF APPEALS OF INDIANA**

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CONRY WILLIAMS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A04-0603-PC-145
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Amy Barbar, Magistrate  
Cause No. 49G02-0110-PC-209309

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**September 14, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Judge**

Appellant-petitioner Conry Williams challenges the denial of his petition for post-conviction relief. Specifically, Williams contends that he is entitled to relief because he established that both trial counsel and appellate counsel were ineffective. Finding no error, we affirm the judgment of the post-conviction court.

### FACTS

On October 13, 2001, Williams took his black Cadillac to Stereo Advantage (Advantage) in Indianapolis for the installation of approximately \$4,500 of stereo and electronic equipment in his vehicle. Williams was unable to pay for the completed work, so Advantage secured the vehicle in the store service bay. On October 26, 2001, between noon and 1 p.m., a man entered Advantage and an employee attempted to assist him. At some point, the man pulled out a gun, led the employee and the store manager into the service bay, and ordered them to lie face down on the floor. Williams was with the gunman, and the two men repeatedly questioned the employees about the mechanics of the cash register operation and the location of the keys to Williams's Cadillac. Douglas Inscore, another Advantage employee, entered the store during the incident and became concerned with what he saw. Inscore left the store undetected, ran to a nearby gas station, and called the police. Meanwhile, Williams and the gunman loaded stereo equipment into the Cadillac from the stock room of the store. The men drove the Cadillac out of the service bay after they filled the vehicle stereo equipment worth thousands of dollars.

The following day, police apprehended Williams as he attempted to flee from them while driving his Cadillac. Upon inspection of the vehicle, the officers found several of the

stolen stereo items, the stereo equipment that Advantage had installed on the vehicle, and a leather lamb's wool jacket that an eyewitness told police Williams had been wearing in the store on the previous day. Williams was subsequently arrested.

On October 31, 2001, Williams was charged with class B felony robbery, two counts of class B felony criminal confinement, class D felony receiving stolen property, class A misdemeanor resisting law enforcement, class A misdemeanor carrying a handgun without a license, and class C felony carrying a handgun without a license. At the initial hearing held the same day, the trial court found Williams indigent and appointed public defender Karen Brogan as his legal counsel. Without Brogan present, Williams orally requested a speedy trial pursuant to Indiana Criminal Rule 4(B), and the trial court set a jury trial for January 7, 2002. On January 3, 2002, the State moved for a continuance because of an absent witness, and the motion was granted. The trial was reset for February 11, 2002, and Williams did not object to the continuance.

Prior to trial, Brogan filed a motion in limine to prevent the State from introducing a tape-recorded telephone conversation of Williams in jail attempting to persuade two friends to help him establish an alibi defense, but the motion was denied. On February 11, 2002, the trial was again postponed until March 4, 2002, because of congestion on the court's calendar. Williams moved for a discharge, but the trial court denied the motion. On March 4, 2002, the trial court again, over Williams's objection, continued the case because of its congested calendar and set the trial for April 29, 2002. On April 29, 2002, Brogan alerted a pro tem judge that there was a potential conflict because Williams wanted to present his alibi

witnesses at trial and Brogan believed she could not ethically present the witnesses because of the audiotapes of Williams in jail attempting to fabricate his alibi. The pro tem judge permitted Brogan to withdraw as counsel, appointed a new public defender, and continued the case until May 13, 2002. However, on May 10, 2002, the presiding judge reappointed Brogan to represent Williams and continued the case until May 28, 2002. Williams was tried by a jury on May 28, 2002, and found guilty on all counts. The trial court merged the theft count into the other counts and sentenced Williams to an aggregate term of imprisonment of forty years.

Thereafter, Williams filed a direct appeal with this court. Williams v. State, No. 49A04-0207-CR-340 (Ind. Ct. App. Aug. 6, 2003). On appeal, Williams argued that he was denied his statutory and constitutional right to a speedy trial, that the trial court erred in denying his motion in limine, that the evidence presented at trial was insufficient to sustain his conviction, that the State did not disclose exculpatory evidence, and that his conviction violated double jeopardy principles. Slip op. at 2. We affirmed Williams's conviction and sentence in all respects. Id. at 15.

On July 26, 2004, Williams filed a verified petition for post-conviction relief alleging that his trial counsel was ineffective for failing to (1) present alibi witnesses, (2) properly preserve and present Williams's right to a speedy trial, (3) object when the trial court sent a tape player and audiotapes to the jury after deliberations had begun, and (4) request a limiting instruction for the jury's use of the jail tapes. Williams also argued that his counsel on direct appeal was ineffective for failing to (1) properly argue Williams's right to a speedy trial, (2)

argue that the trial court abused its discretion when it forced Williams to accept a continuance by appointing a new attorney and then reappointing Brogan to represent him at trial, and (3) argue that the trial court committed fundamental error when it sent audiotapes and a tape player to the jury after deliberations had begun. Following an evidentiary hearing on August 17, 2005, the post-conviction court denied Williams's request for relief. Williams now appeals.

## DISCUSSION AND DECISION

### I. Standard of Review

Before addressing the merits of Williams's contentions, we initially observe that the petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. McCarty, 802 N.E.2d at 962. Post-conviction procedures do not afford petitioners the chance for a "super appeal." Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, post-conviction procedures create a narrow remedy for subsequent collateral challenges to convictions based upon grounds enumerated in the post-conviction rules. Id.; see also Ind. Post-Conviction Rule 1(1). We will disturb the post-conviction court's decision only if the evidence is without conflict, the evidence leads to one conclusion, and the post-conviction court has reached the opposite conclusion. Emerson v. State, 695 N.E.2d 912, 915 (Ind. 1998).

## II. Williams's Claims

### A. Effectiveness of Trial Counsel

Williams argues that Brogan was ineffective because (1) she failed to object when, after jury deliberations had begun, the trial court granted a jury request for a tape player to play audiotapes of Williams on the phone in jail with friends fabricating an alibi, and (2) she failed to call Williams's alibi witnesses at trial.

We apply the two-part test articulated in Strickland v. Washington when evaluating a claim of ineffective assistance of counsel. 466 U.S. 668 (1984); Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 446 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments to the United States Constitution. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. at 687. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

We will not lightly speculate as to what may or may not have been an advantageous trial strategy, as counsel should be given deference in choosing a trial strategy that, at the time and under the circumstances, seems best. Whitener v. State, 696 N.E.2d 40, 42 (Ind.

1998). Finally, if a claim of ineffective assistance can be disposed of by analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

### 1. The Tape Player

Williams first argues that Brogan was ineffective because she failed to object when the trial court granted the jury's request for a tape player after deliberations had begun. Williams also argues that Brogan was ineffective because she failed to object when the audiotapes were given to the jury after the deliberations had begun. However, the post-conviction court found that all of the exhibits were given to the jury at the outset of deliberations and that the trial court merely granted the jury's request for a tape player. Appellant's App. p. 39. Therefore, we will only address the first argument.

At the outset, we note that Indiana Code section 34-36-1-6 requires that if the jurors disagree about trial testimony or the jury desires information on any point of law arising in the case, the trial court must address the jury's request in the presence of, or after notice to, the parties or their attorneys. Except for these two circumstances, it is within the trial court's discretion to handle the jury's request without consulting the parties. Blanchard v. State, 802 N.E.2d 14, 31 (Ind. Ct. App. 2004). Therefore, it is within the trial court's discretion to determine whether to grant a jury's request for a videotape player or audiotape player. See Lawson v. State, 664 N.E.2d 773, 777-78 (Ind. Ct. App. 1996) (recognizing that the trial court providing the jury a means to view or listen to an exhibit admitted at trial does not constitute an abuse of discretion).

In this case, the jury's request for a tape player did not involve a clarification of trial testimony or a point of law; therefore, Indiana Code section 34-36-1-6 did not apply and it was within the trial court's discretion to respond to the jury's request. See Blanchard, 802 N.E.2d at 31; Lawson, 664 N.E.2d at 777-78. Moreover, because the statute does not apply to these circumstances, the trial court properly granted the jury's request for a tape player without consulting Brogan or the State. Brogan simply could not have objected to the jury's request for a tape player because she was not present when the trial court granted the request. Therefore, Williams's ineffective assistance of counsel claim fails because he cannot establish that Brogan's performance was deficient.

## 2. Alibi Witnesses

Williams next argues that Brogan was ineffective because she did not present his alibi witnesses. In essence, Williams claims that the testimony of his alibi witnesses at trial would have exonerated him.

Indiana Rule of Professional Conduct 1.2(d) states that an attorney "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." An attorney may not continue to assist a client in conduct that the lawyer discovers is criminal or fraudulent; instead, the lawyer must withdraw from representation. Prof. Cond. R. 1.2(d) cmt. 10. Additionally, an attorney may not present evidence to the tribunal that he knows to be false, and an attorney must refuse to present a witness he knows will testify falsely. Prof. Cond. R. 3.3(a); id. at cmt. 6.



In this case, the State had audiotapes of Williams in jail on the phone with friends attempting to fabricate an alibi. Brogan, therefore, legitimately believed that Williams's alibi was fabricated and that the alibi witnesses would testify falsely. As Williams's attorney, Brogan could not present the alibi witnesses and still comply with the Rules of Professional Conduct. On March 3, 2002, Brogan wrote a letter to Williams outlining why she thought it was strategically unwise to call Williams's alibi witnesses. Appellant's App. p. 241-242. Brogan concluded the letter by alerting Williams that if he did not agree with her strategic decision, she would still be unable to present the witnesses under the Rules of Professional Conduct because she believed they would testify falsely. Brogan wrote, "When I listened to the tapes, however, I became convinced that your alibi is false. I now have a duty to the Court not to offer your alibi evidence." Appellant's App. p. 242.

Under these circumstances, Williams's claim that Brogan was ineffective for not calling the alibi witnesses must fail. Brogan had a duty to the tribunal not to present evidence she knew was false, therefore, her decision not to present the witnesses was not ineffective and is supported by the Rules. Prof. Cond. R. 1.2(d); 3.3(a). Notwithstanding Brogan's ethical duty to the court, Brogan's decision not to call the witnesses was a strategic one. As Brogan noted in her March 3, 2002, letter to Williams, the audiotapes could be used by the State to rebut facts in dispute. Brogan was convinced that the alibi was false, and she knew that if she presented the alibi witnesses the prosecution could introduce the audiotapes

to attack the credibility of those witnesses.<sup>1</sup> See Ind. Evidence Rule 607. We will not speculate as to what may or may not have been an advantageous trial strategy because counsel is given deference in choosing a trial strategy that, at the time and under the circumstances, seems best. Whitener, 696 N.E.2d at 42. For all of these reasons, Williams's ineffective assistance of trial counsel claim on this issue fails.

### B. Effectiveness of Appellate Counsel

Williams also argues that his counsel on direct appeal, Terrance Richmond, was ineffective because he failed to (1) adequately argue Williams's statutory and constitutional right to a speedy trial, (2) raise on appeal that the trial court abused its discretion when it allowed Brogan to represent Williams at trial, and (3) argue that the trial court fundamentally erred when it permitted the audiotapes to be sent into the jury room.

Ineffective assistance of appellate counsel claims are governed by the same standards that govern ineffective assistance of trial counsel claims. Dawson v. State, 810 N.E.2d 1165, 1173 (Ind. Ct. App. 2004), trans. denied. Ineffective assistance of appellate counsel claims generally fall within one of three categories: (1) denial of access to an appeal, (2) failure to raise issues on appeal, and (3) failure to competently present issues. Id.; see also Bieghler v. State, 690 N.E.2d 188 (Ind. 1997).

When the appellant argues that his appellate counsel failed to raise viable issues, we are very deferential to the appellate counsel and do not find deficient performance when

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<sup>1</sup> As an aside, we note that even though the alibi witnesses were not presented at trial, the audiotapes of Williams on the telephone in jail were admitted because Williams testified at trial and tried to use the alibi defense himself.

counsel's choices were reasonable in light of the facts of the case and the precedent available when the choices were made. Timberlake v. State, 753 N.E.2d 591, 605 (Ind. 2001). To prevail, appellant must show from the information available in the trial record or otherwise known to appellate counsel that counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy. Id. at 606. We look to see (1) whether the unraised issues are significant and obvious from the face of the record and (2) whether the unraised issues are "clearly stronger" than the raised issues. Id. at 605-06.

When the appellant argues that his appellate counsel failed to competently present issues, we review those claims under the highest standards of deference to the counsel's performance. Bieghler, 690 N.E.2d at 195. These claims are the hardest for an appellant to prevail upon. Id. When the issues presented by an attorney are analyzed, researched, discussed, and decided by an appellate court, deference should be afforded both to the attorney's professional ability and the appellate court's ability to recognize a meritorious argument. Id. at 196. Therefore, relief is only appropriate when the appellate court is confident it would have ruled differently if the issue had been thoroughly presented. Id.

### 1. Speedy Trial Claim

Williams first argues that Richmond was ineffective because he did not thoroughly argue a speedy trial claim on direct appeal. Richmond, however, did present Williams's speedy trial claim on appeal, and we found that Williams had waived the claim because his trial counsel did not object to the February 11, 2002, trial continuance. Williams, slip op. at 7-8. While Williams now contends that Richmond should have presented the speedy trial

issue in more detail, this argument fails for two reasons. First, as we concluded on direct appeal, Williams's failure to object to the February 11, 2002, trial continuance waived his speedy trial request. Id. at 8. Therefore, William's ineffectiveness argument fails the deficiency prong of Strickland because any speedy trial argument Richmond could have made on appeal, no matter how detailed, still would have resulted in denial of the claim. Second, notwithstanding such waiver, Williams must overcome the strong presumption that his appellate counsel's assistance was adequate, Bieghler, 690 N.E.2d at 196, and Williams has not overcome this presumption. In particular, Richmond argued that the trial court improperly delayed Williams's case and violated Williams's speedy trial rights under the Sixth Amendment to the United States Constitution and Article I, section 12 of the Indiana Constitution. In essence, Williams fails to show how Richmond might have "further argued" this issue on appeal. Appellant's Br. p. 22. Thus, we defer to Richmond's presentation of this claim and to our resolution of this issue on direct appeal by concluding that Richmond was not ineffective on this issue.

## 2. Brogan as Counsel

Williams next argues that Richmond was ineffective because he did not argue that the trial court erred when it reinstated Brogan as his trial counsel after she withdrew from the case. Again, we show great deference to appellate counsel and do not find deficient performance when the attorney's choices were reasonable in light of the facts of the case. Timberlake, 753 at 605. When an appellant challenges his appellate attorney's decision not to raise an issue, we look to see (1) whether the unraised issue is significant and obvious

from the face of the record and (2) whether the unraised issue is clearly stronger than the raised issues. Id. at 605-06.

Here, Williams's desired argument that the trial court abused its discretion by reinstating Brogan was not obvious from the record and was not clearly stronger than the five issues Richmond did present to our court on appeal. Even more compelling, had Richmond challenged the trial court's decision to reinstate Brogan as trial counsel, that argument too would have failed. As detailed above in section II.A.2, no attorney could have called Williams's desired alibi witnesses because of the cloud of doubt cast over their testimony by the jail audiotapes. Therefore, any attorney the trial court could have appointed to defend Williams would not have ethically been allowed to present the alibi witnesses. Brogan, by not presenting the witnesses, acted as any ethical attorney would have under the circumstances. Hence, we cannot say that Richmond was ineffective for failing to present this issue on direct appeal.

### 3. The Audiotapes

Williams's final claim is that Richmond was ineffective because he did not argue that it was fundamental error for the trial court to send the audiotapes of Williams in jail to the jury. The doctrine of fundamental error is available only in egregious circumstances. Brown v. State, 799 N.E.2d 1064, 1068 (Ind. 2003). To constitute fundamental error, the error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process. Dickenson v. State, 835 N.E.2d 542, 589-49 (Ind. Ct. App. 2005), trans. denied.

Williams's trial counsel did not object to the tapes being sent to the jury, so on direct appeal Williams would have had to show that it was fundamental error for the trial court to give the tapes to the jury. While Williams argues that the tapes were sent to the jury after deliberations had begun, the post-conviction court concluded from the evidence presented that all of the exhibits were sent to the jury room at the start of deliberations and that the court merely sent a tape player to the jury at its request. Appellant's App. p. 39. Therefore, it cannot be established that the decision of the trial court to send the tapes to the jury at the start of deliberations and a tape player to the jury after deliberations had begun violated Williams's fundamental right of due process. See Dickenson, 835 N.E.2d at 589-49; see also Lawson, 664 N.E.2d at 777-78 (finding it was not an abuse of discretion for the trial court to provide the jury, after deliberations had begun, a means to view or listen to an exhibit admitted at trial). As a result, it was not ineffective for Richmond not to raise this argument on appeal.

The judgment of the post-conviction court is affirmed.

VAIDIK, J., and CRONE, J., concur.